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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

SUSAN WHALEN, as legal guardian for
AMY SCHWIRSE,

No. 3:18-cv-02090-SB

Plaintiff,

v.

**PLAINTIFF'S UNOPPOSED MOTION TO
APPOINT GUARDIAN *AD LITEM* AND
SUBSTITUTE PARTY**

**COLUMBIA COUNTY, CORRECT CARE
SOLUTIONS, JEFF DICKERSON, VIVEK
SHAH, JULIE WEIGAND, and TERRY
KALLIO**,

Defendants.

LR 7-1(a) Certification

Pursuant to LR 7-1, undersigned counsel hereby certifies that he conferred with counsel for all defendants and no party objects to this motion or the relief sought.

Motion

Plaintiff moves this court for an order a) appointing Wendi Worlitz as guardian *ad litem* for Amy Schwirse in this action, and b) substituting Wendi Worlitz for Susan Whalen as plaintiff.

Memorandum of Law

Amy Schwirse is a person with a serious mental illness that renders her unable to make rational decisions in her own interest, including the decisions necessary to prosecute this action. Several years prior to the initiation of this action, Susan Whalen, her mother, was appointed by the Columbia County Circuit Court as her legal guardian. *See In the matter of Amy Lynn Schwirse*, Columbia County Circuit Court No. 137079P. As a result, Susan Whalen was able to prosecute this action on her behalf without the court taking any other action to authorize her to do so. *See* Fed. R. Civ. P. 17(c)(1)(A). On November 11, 2019, Susan Whalen passed away after a long battle with cancer.

Prior to her death, Susan Whalen petitioned the Columbia County Circuit Court to allow her other daughters, Brianne Cox and Wendi Worlitz to be appointed as co-guardians for Ms. Schwirse. *See Declaration of Jesse Merrithew*, Ex. 1. By the time the court acted on that petition, Ms. Whalen had died. Ron Schwirse, Ms. Schwirse's father, intervened and asked the court to appoint him as guardian instead. *Id.*, at Ex. 2. Ultimately, the court agreed and appointed Mr. Schwirse as his daughter's legal guardian without objection from Ms. Worlitz or Ms. Cox. *Id.* at Ex. 3. For the purpose of this action, however, it is the desire of both Mr. Schwirse and Ms. Worlitz that Ms. Worlitz be appointed to prosecute this action on Ms. Schwirse's behalf. *See Declaration of Ron Schwirse*.

The proper legal mechanism to accomplish the goals of the parties is for the court to appoint Ms. Worlitz as guardian *ad litem* and substitute her as plaintiff. The court is authorized to do so under Rule 17 and 25. *See Ad Hoc Comm. of Concerned Teachers v. Greenburgh No. 11 Union Free Sch. Dist.*, 873 F.2d 25, 29 (2nd 1989) (holding that the federal court is authorized to appoint a representative other than the lawful representative when the representative is “unable, unwilling or refuses” to serve); *accord Susan R.M. by Charles L.M. v. Ne. Indep. Sch. Dist.*, 818 F.2d 455, 458 (5th Cir. 1987). Rule 17(c) provides that when, as here, a plaintiff is unrepresented in an action, “The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.” Plaintiff is an incompetent person, who is now unrepresented. The court has an obligation to protect her interests by appointing someone with a substantial relationship with her who has the willingness to prosecute her best interests in this action. Wendi Worlitz is the best person to complete this task, and counsel requests that the court appoint her as guardian *ad litem* and substitute her as plaintiff.

DATED this 20th day of January, 2020.

By: /s Jesse Merrithew
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Attorneys for Plaintiff